IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

NO. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

*Petitioner,*

vs.

STATES MARINE LINES, INC., a corporation,

*Respondent,*

and

GULF FLORIDA TERMINAL COMPANY, a corporation,

*Respondent.*

*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## A.

## OPINIONS BELOW

The petitioner herein, PETSONELLA MORAGNE, seeks a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit in the case of *Moragne v. States Marine Lines, Inc.* (5th Cir. 1969) ..... F. 2d ....., Case No. 24198, which affirmed an Order of the United States District Court for the Middle District of Florida, striking from the plaintiff's complaint a count which alleged a cause of action based on unseaworthiness. The Court of Appeals for the Fifth Circuit adopted an opinion and decision of the Florida Supreme Court answering a certified question submitted to it by the Court of Appeals in *Moragne v. States Marine Lines, Inc.* (Fla. 1968) 211 So. 2d 161. Copies of the opinions of the Court of Appeals for the Fifth Circuit and of the Florida Supreme Court are appended hereto as Appendix "A" and Appendix "B".

## B.

## GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered April 1, 1969. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1); 28 U.S.C. § 2101 (c). The petitioner seeks review, by way of certiorari, of the decision and judgment of the United States Court of Appeals for the Fifth Circuit holding that the Florida Wrongful Death Act does not encompass an action for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on navigable waters of the United States within the territorial jurisdiction of Florida. The Court of Appeals' decision is based upon the answer to a certified question given by the Florida Supreme Court. The Court of Appeals adopted Florida law.

The Court of Appeals made it clear in its decision that it felt bound by *Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, and construed the decision in that case to require the Court of Appeals to look to Florida substantive law in reaching its decision.

The petitioner herein contends that the present status of the holding of this Court in *Tungus v. Skovgaard*, supra, is confusing and equivocal. For a prime example of this confusion see *Hornsby v. Fishmeal Co.* (DC WD La. 1968) 285 F. Supp. 990,993. Also see *Igneri v. Cie de Transports Oceanigues* (2d Cir. 1963) 323 F. 2d 257, cert. den. 376 U.S. 949, 84 S. Ct. 965, 11 L. Ed. 2d 969 (1964); *Alcoa Steamship Co. v. Charles Ferran & Co.*, (5th Cir. 1967) 383 F. 2d 46, cert. den. 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968); *Kenney v. Trinidad Corp.*, (5th Cir. 1965) 349 F. 2d 832, cert. den. 382 U.S. 1030, 86 S. Ct. 652, 15 L. Ed. 2d 542 (1966); and *United New York and Sandy Hook Pilots Assn. v. Rodermond Industries, Inc.* (3rd Cir. 1968) 394 F. 2d 65. In *Tungus*, the majority of the Supreme Court originally, in a 5-4 decision, clearly held that the state's substantive law would apply in an action brought under the state's wrongful death act. Since the original opinion in *Tungus v. Skovgaard*, supra, three of the five Justices who constituted the majority of the Supreme Court have either receded from or qualified their reasoning in that case. The Court of Appeals, nevertheless, felt bound by the original opinion.

Since the decision in *Tungus v. Skovgaard*, supra, the overwhelming majority of the courts that have considered the question, i.e. whether a cause of action may be maintained based upon unseaworthiness under the various state statutes, have concluded that such State Wrongful Death Statutes do incorporate a cause of action for unseaworthiness and do incorporate federal admiralty law. Thus, the holding of the Court of Appeals defining the application of substantive law under the

Florida Wrongful Death Act is in conflict with many decisions of other circuit courts construing the death acts of other states.

Additionally, petitioner contends that the construction given to the Florida Wrongful Death Act by the Court of Appeals for the Fifth Circuit and the Florida Supreme Court contravenes Article III, Section 2 of the Constitution of the United States, and contravenes Article VI of the Constitution of the United States.

## C.

## QUESTIONS PRESENTED FOR REVIEW

The primary questions presented are:

I) Does Article III, Section 2 of the Constitution of the United States require the uniform application of substantive admiralty law to actions for wrongful death brought under State Wrongful Death Acts arising out of maritime torts committed on navigable waters of the United States within the territorial jurisdiction of the states.

II) Does the uniformity of admiralty and maritime law as contemplated by Article III, Section 2 of the Constitution of the United States and federally developed maritime principles, in cases arising out of deaths occurring on navigable waters of the United States, prohibit the application of substantive state common law principles which are in conflict with substantive admiralty law.

III) Does the application of substantive state common law principles, which are in conflict with substantive federal admiralty principles, in determining the rights and liabilities of a longshoreman, killed upon navigable waters of the United States within the territorial jurisdiction of the State of Florida, contravene the provisions of Article VI of the Constitution of the United States.

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**NOTE: All emphasis Supplied.**
**R: Record before The Court of Appeals for the Fifth Circuit.**

## D.

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

I) Florida Statutes, 768.01—Right of action for death —(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation *(or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon)*, and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action *(or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her)* and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation *(or the ship, vessel or boat)*, which would have been liable in damages if death had not ensued shall be liable to an action for damages *(or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam)*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. (2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto. (Emphasis added.)

II) Constitution of the United States, Article III, Section 2:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United

States and treaties made, or which shall be made, under their authority . . . to all cases of admiralty and maritime jurisdiction.

III) Constitution of the United States, Article VI:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

## E.

## STATEMENT OF THE CASE

On December 31, 1964, Edward Moragne, Sr., a longshoreman, in Tampa, Florida, was killed while working on board the PALMETTO STATE, a vessel owned by the respondent States Marine Lines, Inc., when a hatch beam over hatch No. 4 on the vessel became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the No. 4 hold striking the deceased in the head killing him almost instantly.

Subsequently, his widow the petitioner, Petsonella Moragne, for herself and her two minor children, and as personal representative of the Estate of Edward Moragne, Sr., brought an action against the vessel owner, States Marine Lines, Inc., pursuant to the Florida Wrongful Death Act, 768.01 (R 4). The defendant, States Marine Lines, Inc., removed the action to the United States District Court for the Middle District of Florida on the basis of diversity jurisdiction (R 1). A motion to remand the action to the State Court (R 42) was subsequently denied (R 51). Petitioner, in Count II of her complaint (R 8), alleged a cause of action based upon the unseaworthiness of the vessel PALMETTO STATE.

Upon motion of the shipowner, States Marine Lines, Inc., to dismiss Count II of the complaint based upon unseaworthiness (R 38), the District Court dismissed the Count from the complaint but in the court's order (R 52) stated that there was involved "a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate determination of this litigation." (R 54).

Petitioner requested leave of the United States Court of Appeals for the Fifth Circuit to take an interlocutory appeal pursuant to 28 U.S.C. § 1292. Such leave was granted by the Court of Appeals on October 28, 1966 (R 55). The respondent herein then requested the Court of Appeals to certify the question of law involved to the Florida Supreme Court and over petitioner's objection the Court of Appeals did on August 11, 1967, forward its certificate to the Florida Supreme Court (R 84). In the certificate transmitted to the Florida Supreme Court by the Court of Appeals for the Fifth Circuit, the question of law to be answered was stated as follows:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of longshoremen caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Florida Supreme Court, by its decision appended hereto, answered this question in the negative on May 29, 1968. Rehearing was denied by the Florida Supreme Court on July 23, 1968.

Petitioner then filed an extraordinary motion in the United States Court of Appeals for the Fifth Circuit asking the Court of Appeals to hold that the Florida Death by Wrongful Act statute did incorporate an action for unseaworthiness by virtue of federal maritime principles and to hold

that the Florida Supreme Court was correct in deciding that the Florida Death by Wrongful Act statute did provide a remedy for death occurring upon navigable waters of the United States within the territorial jurisdiction of Florida but that the Florida Supreme Court was incorrect in holding that the substantive common law principles of Florida followed such remedy and were paramount and superceded the federal maritime law regarding the substantive rights and liabilities of the parties.

The Court of Appeals for the Fifth Circuit heard oral argument on this extraordinary motion on October 28, 1968 and accepted supplemental briefs addressed to the constitutional issues involved.

On April 1, 1969, the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court striking the unseaworthiness count from plaintiff's complaint and said:

> "No useful purpose will be served by additional review of pertinent authority on the issue of law presented in this appeal. It is sufficient to state that in *Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action of unseaworthiness is a question to be decided by the courts of that state."

While this case was pending before the Court of Appeals, the Florida Supreme Court granted certiorari in the case of *Bilbrey v. Weed*, 215 So. 2d 479, and reversed the decision of the Second District Court of Appeals of Florida, 201 So. 2d 771. In the *Weed* case the Florida Supreme Court held that since the substantive state common law applied to deaths occurring upon navigable waters within the territorial jurisdiction of the State of Florida, the cause of action of the plaintiff Weed was barred by contributory negligence of the decedent

in her action under the Florida Death by Wrongful Act statute and that the admiralty doctrine of comparative negligence did not apply under the Florida Statute.

## F.

## REASONS FOR ALLOWING WRIT

The decision and judgment of the United States Court of Appeals for the Fifth Circuit contravenes and violates Article III, Section 2 of the Constitution of the United States. It decides an important issue in a manner which in all probability is not in accordance with the law as this Court would now pronounce it. It applies Florida substantive common law tort principles to a case of death occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida. The petitioner contends that the State of Florida may not, either by its courts or legislature, provide the system of law which prevails and determines the rights, obligations and liabilities of the parties in a case involving a maritime death occurring upon navigable waters of the United States except to the extent that it provides a remedy in addition to other remedies provided by admiralty or federal law for the enforcement of duties rooted in admiralty law.

In this case, the Court of Appeals, adopting the decision of the Florida Supreme Court, has extinguished the doctrine of unseaworthiness in cases of death occurring upon navigable waters of the United States within the territorial jurisdiction of Florida.

If the Florida Supreme Court or the Florida Legislature can constitutionally provide the substantive law applicable to marine deaths, then such state law becomes paramount and takes the place of admiralty substantive law in contravention of Article VI of the Constitution of the United States.

The Court of Appeals failed to distinguish between the *remedy* for an action based upon wrongful death provided by

the Florida Statute (which does not conflict with existing admiralty remedies) and the *substantive law* applicable to torts occurring upon navigable waters of the United States. Here the Court of Appeals delegated to the Florida Supreme Court the authority to determine by what substantive law principles deaths occurring on navigable waters of the State of Florida would be defined and governed.

In so doing, the Court of Appeals stated that it felt constrained to follow the majority opinion of the Supreme Court in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524.

In *Tungus*, the Chief Justice and Justices Black, Douglas and Brennan felt that admiralty law must be applied uniformly and that the State Wrongful Death Statutes must be restricted to furnishing a remedy for wrongful death; that the states had no right to furnish substantive law conflicting with established admiralty law.

Of the Justices in the majority in *Tungus*, Justice Whittaker apparently receded from the majority opinion in *Tungus* in *Goett v. Union Carbide Corp.* (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L. ed. 2d 341, when he said:

> "The court's opinion says that *The Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, 'decided that it was a question of State law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that] [u]nder this holding in a maritime tort death case the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.' *I do not understand the Tungus case to so hold, and if such a*

*holding was intended by its author or by any of the Justices who joined it, it does not say so.*

* * *

> And when, in a case encompassed by the terms of the State's Wrongful Death Statute, admiralty 'adopts' such statute, it does so only to afford a remedy for a substantive cause of action created by the maritime law which 'if death had not insued' would have redressed it." (emphasis supplied) (pages 345-346).

In *Hess v. U. S.*, (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. ed. 2d 305, Justices Harlan and Frankfurter, who joined in the original majority opinion in *Tungus*, apparently qualified their holding in *Tungus*:

> "The Court, if I read its opinion right, holds that when a victim of a maritime tort dies as a result of such conduct, the law of the State whose wrongful death statute is invoked wholly governs liability. At the same time the Court leaves open the question whether a state wrongful death act might contain 'provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them,' finding that this Oregon statute 'presents no such problem.' I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive provisions is, in any event, not offensive to maritime law." (p. 322-323).

In both *Goett* and *Hess* the Chief Justice and Justices Black, Douglas and Brennan, joined with the authors of those decisions solely under compulsion of the majority holding in *Tungus* and expressed their continuing disagreement with the ruling in *Tungus*.

In view of the qualifications placed upon the decision in *Tungus* by three of the Justices, constituting the original majority, it is now difficult to tell what *Tungus* actually stands for. Compare *Tungus* with the Court's language in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143, where this court said:

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a State-created remedy for his right, federal maritime law would be controlling. While States may sometimes supplement federal maritime policies, a State may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

The Court of Appeals for the Fifth Circuit, after spending considerable time, hearing oral argument and accepting supplemental briefs, concluded that it was bound by the original majority opinion in *Tungus* to accord to the State of Florida the right to decide what substantive law would apply to actions for death occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida.

Since the Court's decision in *Tungus*, the overwhelming majority of the courts which have considered the Wrongful Death Statutes of the various states have concluded that these statutes, dissimilar as they may be, in each instance incorporate admiralty substantive law.

It was only when the Florida Supreme Court handed down its opinion in the instant case that the fears of the Chief Justice and Justices Black, Douglas and Brennan, expressed in *Tungus*, came to fruition.

Since this Court's decision in *Tungus*, the following courts have construed death acts of the various states to incorporate admiralty substantive law:

CALIFORNIA

*Curry v. Fred Olsen Lines*, 367 F. 2d 921 (9th Cir. 1966) cert. den. 386 U.S. 971, 87 S. Ct. 1165, 18 L. Ed. 2d 131 (1967)

LOUISIANA

*Grigsby v. Coastal Marine Lines*, 235 F. Supp. 97 (WD La. 1964)

MARYLAND

*Maryland ex rel Smith v. A/S Nabella*, 176 F. Supp. 668 (DC Md. 1959)

*Maryland ex rel Gladden v. Weyerhauser S.S. Co.*, 176 F. Supp. 664, (DC Md. 1959)

*Metzger v. S.S. Kirsten Torm*, 245 F. Supp. 227 (DC Md. 1965)

MICHIGAN

*Hunter v. Dampsk A/S Flint*, (DC ED Mich. 1967) 279 F. Supp. 701

NEW JERSEY

*United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. ed. 2d 541 (1959)

*Petition of Marina Mercante Nicaraguense, S.D.*, 248 F. Supp. 15 (SD NY 1965); 364 F. 2d 118 (1966); cert. den. 385 U.S. 1005, 87 S. Ct. 710, 17 L. Ed. 2d 544; reh. den. 386 U.S. 929, 87 S. Ct. 851, 17 L. Ed. 2d 803 (1967)

NEW YORK

*Cunningham v. Rederiet Vindeggen, A/S,* 333 F. 2d 308 (2d Cir. 1964)

*Clark v. Iceland S.S. Co.*, 6 A.D. 2d 544, 179 N.Y.S. 2d 708, (1st Dept. 1958)

*Olsen v. New York Central Railroad Co.*, 341 F. 2d 233 (2d Cir. 1965)

OREGON

*Hess v. United States*, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960)

*Tallmon v. Toko Kaium K. K. Kobe*, (DC Ore. 1967) 278 F. Supp. 452

PUERTO RICO

*Compania Transatlantica Espanola, S.A. v. Melendez Torres*, 358 F. 2d 209, (1st Cir. 1966)

SOUTH CAROLINA

*Anthony, Adm. v. International Paper Co.*, 289 F. 2d 574, (4th Cir. 1961)

TEXAS

*Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 344 S.W. 2d 421, (Tex. 1961)

VIRGINIA

*Holley v. The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959); cert. den. 361 U.S. 883, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1961)

WEST VIRGINIA

*Union Carbide Corp. v. Goett*, 278 F. 2d 319 (4th Cir. 1960), cert. den. 364 U.S. 826, 81 S. Ct. 64, 5 Law Ed. 2d 55

It is indicated that Massachusetts would follow the same principle. *O'Leary v. United States Lines*, 215 F. 2d 708 (1st Cir. 1954); cert. den. 348 U.S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955); and *Turner v. Wilson Line of Mass.*, 242 F. 2d 414 (1st Cir. 1957).

The verbatim Statutes are set forth in Appendix "C" attached hereto.

Under the Death on the High Seas Act, 46 U.S.C.A. § 761, the federal courts have held that a right of action for unseaworthiness is incorporated within the terms of that act. *Montgomery v. Goodyear Tire and Rubber Co.*, 241 F. Supp. 447 (DC NY 1964); affmd. 392 F. 2d 777 (2d Cir. 1968); cert. den. 393 U.S. 841, 89 S. Ct. 121, 21 L. Ed. 2d 112 (1968); and *Chermesino v. Vessel Judith Lee Rose*, 211 F. Supp. 36 (DC Mass. 1962), affm'd. 317 F. 2d 927, (1st Cir. 1963), cert. den. 375 U.S. 931, 84 S. Ct. 333, 11 L. Ed. 2d 264 (1963).

Thus, Florida stands alone among the major maritime states in denying to the widow and children of a deceased longshoreman the benefit of the maritime doctrine of unseaworthiness and the benefit of the maritime doctrine of comparative negligence.

Uniformity of maritime law forbids such a result. In *Knickerbocker Ice Company v. Stewart*, (1920) 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834, the United States Supreme Court declared unconstitutional an attempt by the Congress to extend the operation of state workmen's compensation statutes to injuries and death occurring on navigable waters within the territorial limits of the states and said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within

the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.

To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states which each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654). (p. 160-161).

Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there

will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (p. 166).

The decision in *Knickerbocker Ice Co. v. Stewart,* supra, followed the Supreme Court decision in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, holding that the New York Workmen's Compensation Statute could not be validly or constitutionally applied to compensate for the death of a longshoreman killed on navigable waters in the State of New York. Subsequent to *Knickerbocker Ice Co. v. Stewart,* supra, the Congress again attempted to extend the State workmen's compensation laws to cover injuries or death of maritime workers occurring on navigable waters within the territorial limits of the States, but excluding masters and members of the crew of vessels. Again the Supreme Court, following *Knickerbocker Ice Co. v. Stewart,* supra, declared unconstitutional this Congressional enactment. *Washington v. W. C. Dawson & Co.* (1924) 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646.

In *Red Cross Line v. Atlantic Fruit Company,* (1924) 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582, the Supreme Court held that the State of New York had the authority to confer a remedy for the enforcement of arbitration contained in a maritime contract and distinguished between remedies, which States have the right to furnish, from the substantive law which the States do not have the authority to tamper with.

In this case the Supreme Court said:

"The 'right of a common law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to re-

dress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (p. 123-124) * * *

This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to either modify the substantive maritime law or to deal with the remedy in courts of admiralty." (p. 124).

The instant decision, which is contrary to all recent holdings by other courts, appears to arise over a confusion between remedies and substantive principles.

There is no question that the Florida Wrongful Death Act provides a remedy for wrongful deaths occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida. It is also established law that this remedy carries with it all the burdens and limitations placed upon the remedy by the state.

The question is, whether or not the state may provide substantive law which conflicts with federal admiralty law to determine the rights and liabilities of the parties for whom the remedy is provided.

The remedy itself does not conflict with any principles of admiralty law. The Congress has not seen fit to legislate in this field or to provide a remedy for wrongful death within the states' territorial waters.

The substantive law governing torts occurring on navigable waters of the United States, however, is fixed and defined by federal law. Here the Court of Appeals has adopted state law which is in violent and direct conflict with the federal substantive law applicable to maritime torts.

If by legislation or court decision Florida may provide a remedy for disputes arising upon Florida's navigable waters where there is no existing remedy under federal law and then may provide the substantive law to go with the remedy where substantive law conflicts with federal law, then such state law becomes paramount to the federal maritime law and contravenes Article III, Section 2 and Article VI of the Constitution of the United States.

This is a result which the framers of the Constitution could not have intended. Clearly, federal law must remain paramount in the settling of disputes arising on navigable waters of the United States.

If the substantive law promulgated by the various states is applied to maritime disputes and is paramount to federal law, then the power of the United States in the maritime field is substantially damaged and one of the basic purposes of the original union of the states has been effectively demolished.

## CONCLUSION

The Petition for Writ of Certiorari should be granted. The Supreme Court should review its reasoning in *Tungus v. Skovgaard, supra,* and recede from the reasoning of the original majority in that case. The decision and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed with instructions to that Court to enter a judgment in accordance with substantive admiralty principles.

Respectfully submitted,

CHARLES JAY HARDEE, JR. of
HARDEE, OTT & HAMILTON
101 East Kennedy Boulevard
Tampa, Florida 33602

*Attorney for Petitioner*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were hand delivered to Fowler, White, Collins, Gillen, Humkey & Trenam, 220 Madison Avenue, Tampa, Florida, Attorneys for States Marine Lines, Inc., and Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, attorneys for Gulf Florida Terminal Company, this 28th day of May, 1969, and to the Clerk of the United States Court of Appeals for the Fifth Circuit by mail this 28th day of May, 1969, in compliance with the Supreme Court Rules.

By.....

*Charles Jay Hardee, Jr.*

# APPENDIX

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## APPENDIX "A"

(Title Omitted)

Opinion filed April 1, 1969.

Appeal from the United States District Court for the Middle District of Florida.

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, Tampa, for Petitioner-Appellant.

John W. Boult, Dewey R. Villareal, Jr. and Fowler, White, Collins, Gillen, Humkey & Trenam, Tampa, for States Marine Lines, Inc.

David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly, Tampa, for Gulf Florida Terminal Co.

Before WISDOM, THORNBERRY, and GOLDBERG, Circuit Judges.

PER CURIAM: On August 11, 1967, this Court entered its certificate certifying to the Supreme Court of Florida the following stipulated question:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Supreme Court of Florida in *Moragne v. State Marine Lines*, 1968, ..... Fla. ....., 211 So.2d 1961, in answer to the question, stated:

> "For the reasons stated, the answer to the question certified must be in the negative."

No useful purpose will be served by additional review of pertinent authority upon the issue of law presented in this

appeal. It is sufficient to say that in *Tungus v. Skovgaard*, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action for unseaworthiness is a question to be decided by the courts of that state.

Since the Florida Supreme Court has determined that the Florida Wrongful Death Statute does not encompass a cause of action for unseaworthiness, the judgment is AFFIRMED.

*Appeal from the United States District Court for the* Middle District of Florida.

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

*JUDGMENT*

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1969

Issued as Mandate: April 23, 1969.

## APPENDIX "B"
(Title Omitted)

Opinion filed May 29, 1968.

Certified Question from the United States Court of Appeals for the Fifth Circuit.

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, for Appellants.

John W. Boult, Dewey R. Villareal, Jr., and Fowler, White, Collins, Gillen, Humkey & Trenam for States Marine Lines, Inc.; David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly, for Gulf Florida Terminal Company, Appellees.

ROBERTS, Justice.

This cause is before the court for determination of a question of law certified to us by the United States Court of Appeals for the Fifth Circuit pursuant to § 25.031, Fla.Stat., F.S.A., and Rule 4.61, Florida Appellate Rules, 32 F.S.A. Moragne v. State Marine Lines, Inc., et al., opinion and certificate filed August 11, 1967. The question certified reads as follows:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

Plaintiff-appellant's decedent was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida. While performing his regular duties as an employee of this company on board the vessel S. S. Palmetto State, a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him instantly.

Suit was filed by his widow, individually, under the Florida Wrongful Death Act, § 768.01, Fla.Stat., F.S.A., and as personal representative of her deceased husband's estate, under the Florida Survival Statute, § 45.11, Fla.Stat., F.S.A., against the defendant-appellee State Marine Lines, Inc., owner of the vessel S. S. Palmetto State, seeking the damages recoverable under these statutes by those entitled thereto. Originally filed in the appropriate state court, the cause was on motion of the defendant removed to the federal court on diversity-of-citizenship grounds.

The plaintiff's complaint was framed in two aspects: one based on the alleged negligence of the defendant-shipowner in failing to keep and maintain the vessel, its equipment and appurtenances, in a safe, sound and proper condition; and another based on the maritime concept of "unseaworthiness." The trial judge dismissed the unseaworthiness count as to the cause of action brought by the plaintiff, individually, under the Florida Wrongful Death Act for the reason that such a cause of action was not within the contemplation of the Wrongful Death Act. Leave to appeal this interlocutory order was granted by the Circuit Court of Appeals, and the question of law quoted above was thereafter certified to this court for decision.

As we understand it, "unseaworthiness" as a basis for liability under maritime law has to do with the absolute nondelegable duty of a shipowner to provide members of the vessel's crew, including longshoremen when engaged in loading, unloading, or stowing the cargo, with a vessel "sufficient in all respects for the trade in which it is employed," Lowe v. Vessel Madrid, D.C.Fla.1962, 210 F.Supp. 826, and to prevent their injury by any part of the vessel or equipment used in the ordinary course of their employment. Clark v. Symonette Shipyards, Ltd., 330 F.2d 554 (C.A.5 1964). It contemplates "liability without fault", Mahnich v. Southern S. S. Co.,

321 U.S. 96, S.Ct. 455, 88 L.Ed. 561 (1944), and has been said to be "a duty likened to implied contractual warranty." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099.

It is conceded that, had he lived, the plaintiff's decedent could have filed suit against the defendant-shipowner, in Admiralty, on a cause of action based on unseaworthiness. But this cause of action died with his death under maritime law. Neither the maritime law nor the common law recognized a cause of action for wrongful death. By statute, Congress has provided a remedy for wrongful death on the high seas (the Death on the High Seas Act, enacted in 1920, 46 U.S.C. Sec. 761); and for the death of a seaman (the Jones Act, 46 U.S.C. Sec. 638). But the death of the plaintiff, a non-seaman within the territorial waters of the State of Florida, is not covered by either of these federal statutes. (We note, parenthetically, that even under the Jones Act the plaintiff could not have recovered for the wrongful death of her husband under her cause of action based on unseaworthiness. See Gillespie, Admx. v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), re-affirming Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686, decided in 1930.)

It appears that the plaintiff, as the widow of the decedent, is entitled to the benefits prescribed by the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C.A., Chapter 18, for the death of her husband; however, any additional remedy to that provided by the federal compensation act must be found, if at all, under the Florida Wrongful Death Act, § 768.01, Fla.Stat., F.S.A.

This Act, § 768.01, provides as follows:

"(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default

of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

Since its enactment in 1833, this Act has been treated as restricted in its application to deaths resulting from tortious acts for which the actor would have been liable to the deceased under traditional common-law concepts. See Shiver v. Sessions, 80 So.2d 905 (Fla.1955), and Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591 (Fla.1956).

It is ~~equally~~ well settled that the Florida Act does not preserve the right of action which the deceased, had he lived, could have prosecuted, but creates in behalf of the statutory

beneficiaries a totally new right of action for the wrongful death, on different principles. See Florida East Coast Railway Co. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933); Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955). In the Florida East Coast Railway case the plaintiff sought to recover in a wrongful death action the punitive damages which the decedent, had he lived, could have claimed. In holding that they could not be recovered, this court said:

> "The common-law right to recover punitive damages having accrued as an incident to the right of the injured party to recover from the tortious injury inflicted in this case, the death of such injured party caused both the right of action and the incidents to it to die at the same time."

It was also pointed out that the language of our Wrongful Death Act, requiring the jury to give such damages "as the party or parties entitled to sue may have sustained by reason of the death of the party killed", clearly implied that punitive damages were to be excluded from consideration in a wrongful death action.

Further illustrating the distinction between the two rights of action—that of the deceased, had he lived, and that of the statutory beneficiaries under the Wrongful Death Act—it was held in each of the other two cases cited above that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, supra, 82 So.2d 131.

Because of its obligation, in enforcing a state-created right, to "take the right subject to the limitations which have been made a part of its existence * * *", The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), the Fifth Cir-

cuit Court of Appeal held in two cases in accordance with the decisions of this court, supra, that an action for wrongful death based on unseaworthiness was not within the contemplation of the Florida Wrongful Death Act. See Graham v. A. Lusi, Ltd., 206 F.2d 223 (C.A.5, 1953), and Emerson v. Holloway Concrete Products Co., 282 F.2d 271 (C.A.5, 1960).

On the appeal in the instant case, and here, the appellant contends that amendments to the Florida Wrongful Death Act made in 1915 and in 1953 have changed its complexion: that, while originally creating and authorizing death actions only when based on a tort against the plantiff's decedent, the Act has now been broadened to include causes of action arising *ex contractu* as well as *ex delicto*. The appellate court was urged to recede from its decisions in the Graham and Emerson cases, and this court is urged to reject those decisions and align itself with the "great weight of authority" in other jurisdictions and hold that a death action based on unseaworthiness is created by he Florida Wrongful Death Act.

The courts of other jurisdictions, in the decisions here relied on by appellant, appear to us to have made an entirely different interpretation of their wrongful death acts from that made by this court. For example, in Holley v. The Manfred Stansfield, 269 F.2d 317 (C.A.4th 1959), it was held that the Virginia statute was intended "to preserve rights which the decedent would have had if his injuries had not proved fatal." This interpretation is in direct conflict with the statement of this court concerning the Florida Act in Florida East Coast Railway Co. v. McRoberts, supra, 149 So. 631, that the provisions of the Act

> "* * * do not purport to transfer to the statutory representatives * * * the right of action which the injured party might have maintained for his injury had he lived, but those sections give to such statutory representatives * * * a totally new right of action for the wrongful death, and that on different principles."

Likewise, in Vassallo v. Nederl-Amerik etc., 162 Tex. 52, 344 S.W.2d 421 (1961), in rejecting the construction of the Texas Wrongful Death Act made by the Fifth Circuit Court of Appeals in Truelson v. Whitney and Bodden Shipping Co., 10 F.2d 412 (C.A.5 1926), as to the applicability in a death action of the comparative negligence rule recognized in Admiralty, it was said that under Texas Wrongful Death Act

> "* * * the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased longshoreman have the same substantive rights to recover as the deceased would have had had his injury been less than death. It follows that his contributory negligence must be considered only in mitigation of damages."

This interpretation is contrary to the decisions of this court quoted above; since, as noted, in the Shiver and Parker cases, supra, 80 So.2d 905 and 82 So.2d 131, the defense asserted by the defendant in each of those cases would have been a bar to a suit by the decedent to recover for *his* injuries, but was disallowed in the suit filed by the statutory beneficiaries to recover for *their* injuries; and in the Florida East Coast Railway case, supra, 149 So. 631, it was held that a substantive right of recovery which the decedent would have had (to recover punitive damages) was extinguished with his death along with his right of action, and that, having once died, the express terms of the Act—requiring the jury to award such damages as the *statutory beneficiaries* may have sustained by reason of the death of their decedent—"affirmatively negatives the idea that punitive damages are to be considered as an incident to the damages allowed for the new statutory cause of action." 149 So. at p. 636. And it would seem to be just as inconsistent with the express terms of the Act to allow the damages sustained by the *statutory beneficiaries* by reason of the death of their decedent to be "mitigated"—that is, reduced—

in such proportion as the negligence of their decedent contributed to *his* injuries and damage, as it would have been to award punitive damages to the statutory beneficiaries because of the injuries sustained by their decedent. Yet this would be the result of the holding here contended for by appellant, since the maritime concept of "unseaworthiness" not only holds the ship-owner *liable without fault* but also allows the seaman or longshoreman to recover even though he is at fault—the so-called comparative negligence rule of the maritime law. As noted above, such a result would appear to be "affirmatively negatived" by our Wrongful Death Act, as in the Florida East Coast Railway case, supra, 149 So. at page 636.

We are not, therefore, persuaded by the decisions cited by the appellant, since they appear to be bottomed on statutes entirely different—or, at least, interpreted differently—from the Florida Wrongful Death Act. On the other hand, the appellee calls our attention to decisions based on death statutes interpreted as creating "a new right of action" and holding that the substantive law of the state, rather than concepts peculiar to maritime law such as "unseaworthiness" and the comparative negligence rule, was applicable in a wrongful death action. See Lee v. Pure Oil Co., 218 F.2d 711 (C.A. 6, 1955); Curtis v. Garcia y Cia, 241 F.2d 30 (C.A. 3, 1957); and Niepert v. Cleveland Electric Illuminating Co., 241 F.2d 916 (C.A. 6, 1957), cert. den. 354 U.S. 909, 77 S.Ct. 1295, 1 L.Ed.2d 1427 (1957). These decisions are in accord with the interpretation of the Florida Wrongful Death Act made by this court in the decisions cited above, and many others.

Nor are we persuaded that the 1915 and 1953 amendments to the Florida Wrongful Death Act had the effect of *creating* a right of action for death caused by unseaworthiness, as contended by the appellant.

The 1915 amendatory Act, Ch. 6913, Laws of Florida, Acts of 1915, was entitled "AN ACT to Amend Section 3145,

General Statutes of the State of Florida, [Sec. 768.01(1), Fla.Stat.] Relating to Claims for Death Caused *by Negligence.*" (Emphasis added.) It added to the statute the clauses appearing in parentheses in the Act, Sec. 768.01(1), quoted above. The parentheses were a part of the Act, as amended. The purpose of the Legislature in parenthesizing these additions to the Act is not apparent; perhaps, it was simply to make clear that the Act contemplated a cause of action for death even though predicated on circumstances giving rise to a tort cognizable in Admiralty as well as under the substantive law of this state. In any event, we cannot assume that the Legislature intended, in 1915, to extend the Wrongful Death Act to include a right of action based on a concept purely maritime in character, unknown to the common law and the substantive law of this state, contrary to the decisions of this court interpreting the Act, and not within the intendment of the Act, as expressed in the title of the amendatory Act, as one creating a cause of action "for death caused by *negligence.*" If this had been intended, it would have been a simple matter to add appropriate words at the end of the list of derelictions recited in the Act, and to so indicate in the title of the amendatory Act. It did not do so, and still has not done so, unless that result was achieved by the 1953 amendment to the Act, as here contended by the appellant.

The 1953 amendment, Ch. 28280, Laws of Florida, Acts of 1953, added Subsection (2) of the Act, to provide that

> "(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

It was adopted subsequent to the decision of this court in Whiteley v. Webb's City, Inc., 55 So.2d 730 (Fla.1951), presumably to encompass a death action based on a cause of action for breach of implied warranty without fault recognized by this court in a limited area. See Sencer v. Carl's Market, Inc.,

45 So.2d 671 (Fla. 1950); Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla.1965), and cases cited therein. The appellant makes the ingenious argument that a cause of action for "unseaworthiness" is a specie of "liability without fault", in the nature of an "implied contractual warranty", and, as such, is within the contemplation of the 1953 amendment, supra.

We think no useful purpose would be served in entering into a discussion of the "strict liability" theory under which this court has in a few situations—mostly involving foodstuffs—held a manufacturer or retailer to be strictly liable for injuries resulting from use of a product without regard to established common-law principles relating to implied warranty. It suffices to say that the maritime concept of "unseaworthiness" is completely foreign to the "implied warranty" concept of strict liability with which the Legislature was obviously concerned in enacting the 1953 amendment. Moreover, to hold that "unseaworthiness" is contemplated by the Act, as amended in 1953, we would have to assume that the Legislature intended to grant to one small segment of our population (the surviving dependents of a deceased longshoreman or seaman killed in the course of his employment) the special privileges which the maritime law would have accorded, not to *them*, but to their *decedent*, and to deny an equal advantage to others similarly situated in all respects except as to the occupation of their decedent. In the absence of a clear legislative mandate, we cannot infer such a discriminatory intention on the part of the Legislature, even if it be assumed, arguendo, that such an intention could be validly accomplished. Cf. Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co. of Southeast Georgia, 175 So.2d 39 (Fla.1965).

Finally, we note that the Legislature lost no time in amending the Wrongful Death Act following the decision of this court in the Whiteley case, supra, 55 So.2d 730 (it was amended at the next succeeding session of the Legislature),

yet more than fifteen years have elapsed since the Fifth Circuit Court of Appeals held in the Graham case, supra, 206 F.2d 223, that the Act was not applicable to a death action based on the maritime tort of "unseaworthiness," and it has been more than eight years since this holding was re-affirmed in the Emerson case, supra, 282 F.2d 271. The Legislature has not seen fit to act in response to such decisions.

In all of these circumstances, it is our opinion that to hold that "unseaworthiness" is within the contemplation of our Wrongful Death Act would be tantamount to judicial legislation; and this, of course, is beyond our constitutional power.

The decision of a Florida District Court of Appeal in Weed v. Bilbrey, 201 So.2d 771, referred to by appellant, has been noted; however, this decision is pending before this court on direct-conflict certiorari and is not, therefore, either final, authoritative or decisive of the certified question.

For the reasons stated, the answer to the question certified must be in the negative.

CALDWELL, C. J., and THOMAS, J., concur.

WHITE, Circuit Judge (Retired), concurs with Opinion.

ERVIN, J., dissents with Opinion.

WHITE, JOS. S., Circuit Judge (Retired) (concurring).

Liability for "unseaworthiness" as applied by the Federal Courts seems even broader than liability for breach of implied warranty. While the duty arising in case of unseaworthiness has been compared, by way of illustration, with the duty created by implied warranty, yet the Supreme Court of the United States, at the same time, has said: "It (liability for unseaworthiness) is essentially a species of liability without fault, analogous to other well known instances in our law. Deriving from and shaped to meet the hazards which performing the service imposes, the liability *is neither limited by conceptions of negligence nor contractual in character.*" See Seas Shipping Co. v. Sieracki, supra. (Emphasis added.)

This concept takes the case beyond the purview of Florida's Wrongful Death Statute.

Hence, I concur in the opinion prepared by Mr. Justice ROBERTS.

ERVIN, Justice (dissenting).

I am unable to agree with the foregoing opinion insofar as it holds that Florida's Death by Wrongful Act statute (F.S. Section 768.01, F.S.A.) does not incorporate the general maritime law concept of "unseaworthiness" of a vessel.

I agree with the reasoning supplied by Judge Brown in his able dissent in Emerson v. Holloway Concrete Products Company (5th Cir.1960), 282 F.2d 271, 285, to the effect that the specific reference to admiralty proceedings contained in the Florida statute reflects a commanding purpose to "extend to survivors whatever benefit the substantive maritime law would have afforded for maritime injuries."

Prior to 1953, I acknowledge that some doubt could have been raised in opposition to the view that Florida's statute incorporated substantive maritime concepts; or at least some speculation could have been proferred as to the extent of any such incorporation. Thus, before 1953 the enumeration of the terms "wrongful act," "negligence," "carelessness," or "default" may have provided some support for the proposition that the statute only extended to embrace liability concepts sounding in the characteristics suggested by those specific terms; that is, liability predicated on duties responsive to the fault or negligence culpability of the defendant. Accordingly, until 1953 it might have been argued with some force that the purposeful scope of the statute necessarily excluded the maritime doctrine of "unseaworthiness" and other principles which predicate liability on implied warranty theory or which are founded on expanding concepts of "strict liability." It is obvious, however, that whatever notion may have existed prior to 1953 concerning the limited nature of substantive concepts of liability under the statute [see Whiteley v. Webb's City,

Inc. (Fla.1951), 55 So.2d 730] such was clearly expunged by the amendment (Ch. 28280) in 1953 by the Florida Legislature which provided for actions thereunder ex contractu or ex delicto. Under the amendatory clarification as to the intended scope of substantive liability embraced by the statute, this Court has incurred little difficulty in predicating wrongful death recovery on the theory of "implied warranty." See Green v. American Tobacco Co. (Fla.1963), 154 So.2d 169. In light of these developments, it can no longer be logically asserted that our Wrongful Death Statute is strictly a "Lord Campbell's Act," and thereby exclusive of those substantive liability concepts foreign to the common law at the time of its enactment.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, seaworthiness was said to be a "duty likened to implied contractual warranty." In Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950), cert. den. 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343 (1950), it was defined as "a relationship giving rise to an implied warranty as between the owner and seaman." Viewed, therefore, in accordance with the crystallized scope of our statute pertaining to the substantive law on which recovery thereunder may be achieved, I am convinced that the statute contemplates the incorporation of the maritime concept of seaworthiness. See Weed v. Bilbrey (Fla.App.1967), 201 So.2d 771, holding that the statute embraces the maritime doctrine of comparative negligence. By holding otherwise, I feel the majority has unduly restricted the intent embraced by the 1953 amendment to the statute and has placed in doubt, if not departed from, the existing law relating to recovery for death predicated on implied warranties of fitness and suitability or other strict liability concepts. See Toombs v. Ft. Pierce Gas Co. (Fla.1968), 208 So.2d 615, for example of the expanding development of nonmaritime liability concepts as potential grounds for predicating wrongful death benefits.

## APPENDIX "C"

## WRONGFUL DEATH STATUTES OF STATES

### *CALIFORNIA*

Title 3, § 377, California Statutes Annotated

§ 377. Wrongful death of adults or certain minors; actions by personal representatives; death of wrongdoers; damages; consolidation of actions

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain as action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party.

## *FLORIDA*

Title 21A, § 768.01, Florida Statutes Annotated
§ 768.01 Right of action for death

(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation or by the wrongful act, negligence, carelessness, or default, of any agent or any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) *and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation* (or the ship, vessel or boat), *which would have been liable in damages if death had not ensued shall be liable to an action for damages* (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), *notwithstanding the death of the person injured,* and although the death shall have been caused under such circumstances as amount in law to a felony.

(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

## *LOUISIANA*

Title 5, Article 2315, Louisiana Statutes Annotated
Art. 2315. Liability for acts causing damage; survival of action

Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the

right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

If the above right of action exists in favor of an adopted person, it shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, for the space of one year from the death. However, this right of action shall survive in favor of the blood parent or parents to the exclusion of the adoptive parent or parents when at the time of the adoption the adopted was a major, or emancipated minor whose adoption was effected without the consent of the blood parent or parents evidenced in the act of adoption. In default of these, it shall survive in favor of the surviving blood brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters of adoptive parent, or parents, or adopted person, as the case may be.

## *MARYLAND*

Article 67, § 1, Maryland Statutes Annotated

§ 1. Liability notwithstanding death

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or de-

fault is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the vessel or person who would have been liable if death had not ensued, or the executor or administrator of the said person who would have been liable in case of the death of the said person who would have been liable, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony and if death ensues as a result of wrongful act, neglect or default of a vessel, suit may be brought in rem against said vessel in any court of competent jurisdiction; provided, however, that any such action against the executor or administrator of the said person who would have been liable shall be commenced within six calendar months after the date of the qualification of the executor or administrator of the said person who would have been liable.

## *NEW JERSEY*

Chapter 31, Sec. 2A:31-1, New Jersey Statutes Annotated

2A:31-1. When action lies

When the death of a person is caused by a wrongful act, neglect or default; such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

## *NEW YORK*

Article 5, § 130, New York Statutes Annotated

§ 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

## *OREGON*

§ 30.020, Actions and Suits in Particular Cases, Oregon Statutes Annotated

§ 30.020 Action by personal representative for wrongful death.

When a death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $25,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.

## *SOUTH CAROLINA*

Chapter 23, § 10-1951, South Carolina Statutes Annotated
§ 10-1951. Civil Action for wrongful act causing death

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

## *TEXAS*

Title 77, Article 4671, Texas Statutes Annotated
Article 4671. 4694, 3017, 2894 Cause of action

No agreement between any owner of any railroad, street railway, steamboat, stage-coach or other vehicle for transporting passengers or goods, or any industrial or public utility plant, or other machinery, and any person, corporation, trustee, receiver, lessee joint stock association or other person in control of, or operating the same, shall release such owner, person, trustee, lessee; corporation or joint stock association from any liability fixed by the provisions of this article. An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases:

1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of another person, association of persons, joint stock company, corporation or trustee or receiver of any person, corporation, joint stock company, or association of persons,

his, its or their agents or servants, such persons, association of persons, joint stock company, corporation, trustee or receiver, shall be liable in damages for the injuries causing such death. The term "corporation," as used in this article, shall include all municipal corporations, as well as all private and public and quasi public corporations, except counties and common and independent school districts.

2. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of the proprietor, owner, charterer or hirer of any industrial or public utility plant, or any railroad, street railway, steamboat, state-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, wrongful act, neglect, carelessness, unskilfulness or default of his, their or its servants or agents, such proprietor, owner, charterer or hirer shall be liable in damages for the injuries causing such death.

3. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness or default of the receiver, trustee or other person in charge of or in control of any railroad, street railway, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or any industrial plant, public utility plant, or any other machinery, or by the wrongful act, neglect, carelessness, unfitness, unskilfulness or default of his or their servants or agents, such receiver, trustee, or other person shall be liable in damages for the injuries causing such death, and the liability here fixed against such receiver, trustee, or other person shall extend to all cases in which the death is caused by reason of any bad or unsafe condition of the railroad, street railway or other machinery under the control or operation of such receiver, trustee or other person, and to all other cases in which the death results from any other reason or cause for which an action may be brought for damages on account of personal injuries, the same as if said railroad, street railway or other machinery were being operated by the owner thereof.

## *VIRGINIA*

Article 3, § 8-633. Virginia Statutes Annotated

§ 8-633. Action for death by wrongful act

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. And any right of action which may accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured person.

Every action under this section shall be brought within one year after the death of the injured person, notwithstanding the provisions of § 8-24.

§ 5474. Actions and Suits, West Virginia Statutes Annotated

§ 5474.[5] Action for Wrongful Death

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party.